Supreme Court, U.S.
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No. 94-944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,
v.
JOHN A. AND MARY B. SCHMITZ, RESPONDENTS.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,
v.
HOWARD H. AND MARIANNE KELLER, RESPONDENTS.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,
v.
MICHAEL L. AND BILLIE M. RICE, RESPONDENTS.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether age discrimination in violation of the duty imposed by the Age Discrimination in Employment Act of 1967 is a tort-like personal injury, entitling victims to exclude settlement amounts from their gross income as "damages received . . . on account of personal injuries" under Section 104(a)(2) of the Internal Revenue Code.

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PRELIMINARY STATEMENT

This Brief in Opposition is submitted on behalf of respondents John and Mary Schmitz and Howard and Marianne Keller, who are represented by the same counsel as the taxpayers in *Commissioner* v. *Schleier*, cert. granted, No. 94-500.

The lawsuit against United Air Lines, Inc., whose tax treatment is at issue in this case was a class action under the Age Discrimination in Employment Act of 1967 (the "ADEA") that is already before the Court as a result of the grant of certiorari in *Commissioner* v. *Schleier*. The group of plaintiffs involved in this ADEA class action has been referred to as the "Schleier Group" in case No. 94-500.

COUNTER-STATEMENT OF THE CASE

In accordance with Rule 24.2, respondents Mr. and Mrs. Schmitz and Mr. and Mrs. Keller limit their statement to the following clarifications:

1. Petitioner refers to *Downey* v. *Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir. 1994), *petition for reh'g denied* (Nov. 18, 1994), as a "case arising out of the United Airlines [sic] settlement agreement." Pet. at 5. This inaccurately implies that the taxpayer in *Downey* had been a member of the Schleier Group. However, Mr. Downey did not file a complaint alleging age discrimination against the airline until approximately five years after the class action commenced by members of the Schleier Group. *See* 97 T.C. at 154. The taxpayer in *Downey* did not participate directly in the settlement of the ADEA class action referred to in the Preliminary Statement involving United Air Lines, Inc. His lawsuit was settled before and separately from the disposition of the class action. *Id.* at 155. The taxpayers in *Downey* are

represented by different counsel from the attorneys in *Schmitz*, *Keller*, and *Schleier*.

2. Although the Tax Court issued its original opinion in *Keller* v. *Commissioner*, Pet. App. at 3a, following its decision in *Downey*, it subsequently separated the rationales for the holdings of the two cases by entering a decision on behalf of Mr. and Mrs. Keller on the basis of *Redfield* v. *Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1991), under the rule of *Golsen* v. *Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), shortly after the decision of this Court in *United States* v. *Burke*, 112 S.Ct. 1867 (1992). *See* Pet. App. at 12a - 13a.

3. The lawsuit against Stauffer Chemical Company that Mr. Rice prosecuted is unrelated to the Schleier Group's proceedings involving United Air Lines, Inc. Mr. and Mrs. Rice are represented by separate counsel, Mr. Edward Diener, who has been provided with a copy of this brief as well as the Brief in Opposition in *Commissioner* v. *Schleier*.

REASONS FOR DENYING THE WRIT

The cases of Mr. and Mrs. Schmitz and Mr. and Mrs. Keller present the same legal issue as *Commissioner* v. *Schleier*, cert. granted, No. 94-500. Without waiving any of the arguments presented by the Brief in Opposition in case No. 94-500, which apply with equal force in their cases, Mr. and Mrs. Schmitz and Mr. and Mrs. Keller inform the Court that they are unaware of any principled basis for granting certiorari in *Commissioner* v. *Schleier* and denying it in their cases.

CONCLUSION

Mr. and Mrs. Keller agree that the petition in their case should be held and disposed of as appropriate in light of the Court's disposition of *Commissioner* v. *Schleier*, No. 94-500. Mr. and Mrs. Schmitz are sympathetic to the petitioner's request for similar treatment of their case, and have no interest in a consolidation of their case with *Schleier*, if proceedings in the latter would be delayed or complicated thereby or if no other cases are consolidated with *Schleier*. Mr. and Mrs. Schmitz therefore agree with the petitioner's suggestion that their case also be held, unless the Court believes its consideration of *Commissioner* v. *Schleier* would be assisted by joining a related proceeding in the least disruptive manner possible, in which case they are agreeable to having their case consolidated with *Commissioner* v. *Schleier*.

Respectfully submitted,

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